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IN THE

Supreme Court of the United States

October Term, 1962

No. 484

JOSEPH GALLO,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Dated: Brooklyn, New York
October, 1962.

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Statement

This is a petition for a writ of certiorari to review a judgment of a state court of last resort, the New York Court of Appeals, unanimously affirming a judgment which convicted petitioner of the crime of Coercion in violation of Section 530 of the Penal Law of the State of New York (Consolidated Laws of New York, Chapter 40). Petitioner was sentenced to imprisonment. This affirmance without opinion is reported in 10 N. Y. 2d 1024, 225 N. Y. S. 2d 45, 180 N.E. 2d 433. The Court of Appeals in 11 N. Y. 2d 769, 227 N. Y. S. 2d 20, 181 N.E. 2d 764, granted a motion to amend the remittitur. A subsequent motion by petitioner in the Court of Appeals for reargument or for alternative relief was denied (11 N. Y. 2d 1111, 230 N. Y. S. 2d 734).

Question Presented

Upon this prosecution for the crime of *Coercion*, did the trial court's refusal to accept proof of petitioner's acquittal of the crime of *Conspiracy* in Nassau County in the State of New York, in support of his plea of double jeopardy, violate his constitutional rights under the Fifth Amendment to the Constitution of the United States or deprive him of due process contrary to the Fourteenth Amendment?

Although petitioner urges that five questions, including the foregoing, are proper before this Court (Petition, pages 3 and 4), we discuss only that of double jeopardy as a deprivation of constitutional rights. We believe no other question has been properly preserved for review.

We read the order of the Court of Appeals amending the remittitur herein (Petition, pages 6a, 7a) as reciting that the only Federal question presented by petitioner and passed upon by that Court was that of double jeopardy.

Statute Involved

Section 530 of the New York Penal Law, insofar as pertinent here, and upon which the indictment was predicated, provides:

> "Penal Law, Section 530—Coercing another person a misdemeanor.
>
> A person who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully, * * *
>
> 3. Uses or attempts the intimidation of such person by threats or force,
>
> Is guilty of a misdemeanor."

The Indictment

"FIRST COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this count in this indictment, accuse the defendant of the crime of ATTEMPTED ASSAULT IN THE SECOND DEGREE, IN VIOLATION OF SECTION 242 OF THE PENAL LAW OF THE STATE OF NEW YORK.

SECOND COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this count in this indictment, accuse the defendant of the crime of COERCION, IN VIOLATION OF SECTION 530 OF THE PENAL LAW OF THE STATE OF NEW YORK.

The acts and transactions alleged in the foregoing counts of this indictment, are connected together and form parts of a common scheme and plan."

The Evidence

Respondents, People of the State of New York, called two witnesses in support of the prosecution. Petitioner called no witnesses, nor did he testify in his own behalf. The testimony of The People's witnesses is as follows:

A. The Testimony of Rocco Supino

Supino is the owner of a bar and grill located at 312 Bedford Avenue in the Borough of Brooklyn, City of New York, known as Rocky's Bar & Grill (83, 84).* He owned

* Numerals refer to folios in the printed Record on Appeal.

the business for three years prior to December, 1958 (84). The manager of the place was one Jerry Robinson (later called as the second witness for the People) who held the position since Supino became the owner (84, 85).

In December, 1958, there was a pin ball machine in the bar, owned by J and L Amusement, which had been there from the inception of Supino's ownership (85-87).

In December, 1958, Supino directed his manager, Robinson, to remove the machine (88) because the owners "didn't fix it" and "were supposed to give me some money, and they didn't live up to their promise" (91). Thereafter, prior to December 4, 1958, the machine was put in the back of the premises and was not in use (93).

On December 4, 1958, Supino saw petitioner, Gallo, in the premises (97). He had never seen Gallo before and had never spoken to him or had any business transaction with him (98). Gallo was talking to Robinson at the time in the dining room (102). When Supino approached them, Gallo said, "What do you want? We are talking private." Robinson told Gallo that Supino was the owner, whereupon Gallo said, "Do you mind? We are talking private." Robinson and Gallo then walked into the kitchen (103).

Afterwards, Supino went into the kitchen. He did not ask Gallo who he was and Gallo did not tell him (104, 105). Gallo said to Supino "Be a nice fellow and put the machine back in again." When Supino refused, Gallo rejoined, "if we can't come to some kind of agreement *we* will have to put some pickets out" (105).

While Gallo was in the premises talking to Robinson, Gallo had a pointed bread knife in his hand, and was tapping it on the table. The knife was 15 or 16 inches long

(109-112). The knife was still in Gallo's hand when Supino entered. Gallo was "banging it on the table" (113). Supino was "afraid of the business, you know, having trouble with the union and stuff like that" (114). He was not "bulldozed" and no one raised his voice to him (142). No "rough language" was used. The knife was not pointed at him (149).

At this time, Supino had no union members employed by him, nor did he have a contract with any union (147).

On the following day, December 5th, two persons picketed the premises (117). They carried signs stating "Local 266" (122). The pickets remained about 15 feet in front of the premises for an hour (123).

While the pickets were there, Supino had a conversation with his attorney, who then made a telephone call, after which the pickets left (126).

After the incident, Supino made no complaint until he was subpoenaed by the District Attorney's Office prior to testifying before the Grand Jury (133-135).

Supino did not have a contract by which he was required to keep the machine in the premises (159). He believed there was no written agreement with J and L other than "at the beginning". The only thing he "signed with them was a loan for $600" (160-162).

During cross-examination of Supino, defense counsel offered a paper which was marked Defendant's Exhibit B for identification (177). There were two signatures at the bottom of it which Supino identified as his own and that of Robinson (177). Supino stated that he had signed the paper but had not read it (180). Exhibit B was then re-

ceived in evidence (182). At this point the jury was excused and a colloquy took place at the bench during which the Court excluded the document (197) on the ground that it was a collateral matter, having no bearing on the main issue (189). An exception was taken by petitioner (197).

B. The Testimony of Jerry Robinson

Robinson is a bakery driver who manages Supino's bar & grill during the day (213). He has no financial interest in the bar & grill, and has been employed as salaried manager since 1955 (213, 214).

In December, 1958, there was a machine in the premises which Robinson described as a "bowling machine, not a pin ball machine" (214, 215), owned by J and L Amusement (216). On or about December 5, 1958 Gallo came into the bar. Robinson had never seen him before that (218). They had a conversation about the machine. The bar owner, for whom Gallo had inquired, was not present at that time (220, 221). Gallo said he would like to see the machine put back and that "if it wouldn't be straightened out, there would be pickets there" (222).

The conversation was held in the kitchen, and while talking, Gallo held a bread knife in his hand. "He was playing with it on the table. It was there. He was bouncing it up and down" (225). "But at no time did he ever threaten or say anything" (225). Later, Supino entered the kitchen and Robinson left (227).

The day before a man named De Forte who was a vice-president of a union, spoke to Robinson and told him "he would put pickets there" (228-229). De Forte told Robinson he was a delegate of Local 266 and he "doesn't like to

see anything happen, but it wasn't in his power and he would have to go back and take it up with the president" (230). Mr. De Forte said the operators of the machine belonged to his union and he had to defend them by putting pickets there (247).

When Robinson spoke to Gallo about the machine there was no discussion about employing non-union men to fix the machine. The dispute was over the fact that Supino no longer wanted it in the bar (250). Gallo told Robinson that he (Gallo) was "from the association" (274) and that the owner of the machine was a member of the association (298). Gallo did not threaten him (317). Gallo said he was from the association—not the union (318). There was never any trouble over which servicemen should fix or service the machine (335). On the day J & L were notified to remove the machine, a label of Local 266 was placed on the machine (336).

POINT I

The evidence justified the verdict of the jury.

A detailed summary of the evidence has been set forth on the preceding pages of this brief. In essence the uncontradicted evidence established that petitioner threatened the complainant that if he did not re-install a certain bowling machine in his premises, pickets would be placed at the premises. Following the complainant's refusal, several pickets actually appeared the following day.

Moreover—and significantly—when the threats were made, petitioner held a 15 inch long pointed bread knife in his hand, although he did not overtly threaten to use it.

This case presents yet another instance of the increasing incidence of coercion cases where the threats are, in actuality, the creation of a purported "labor controversy", where none in fact exists. Petitioner knew, and the jury so found, that there was no labor dispute at the place of business, nor was there any basis for a labor dispute. If a dispute existed at all, it was between the owner of the bar and the owner of the machine over a *lease* (See Petitioner's exhibit B for identification, providing that "the operator *leases* to the proprietor one coin operated amusement game, etc."; Petition, pages 37a, 38a). The controversy, if any ever existed, was a management dispute, not a labor dispute.

POINT II

Under New York Law, petitioner's prior acquittal of the crime of conspiracy was not a bar to the conviction herein of the crime of coercion.

It appears from Defendants' exhibits C, D, and E for identification that prior to the conviction herein, petitioner and some fourteen other persons were indicted in Nassau County for the crime of Conspiracy to commit the crimes of Extortion, Coercion and Violation of Section 340 of the New York State General Business Law, and that after trial this petitioner was acquitted. It appears further that at the trial evidence (presumably as an overt act of the conspiracy) was received of some of the facts relating to the coercion charged at bar.

Petitioner now urges that by the indictment under which he was convicted at bar he has been "twice put in jeopardy for the same offense" in violation of Article 1, Section 6 of

the New York State Constitution, and that rejection of this claim by the Courts below deprived him of Federally guaranteed due process.

At the outset it should be noted that Conspiracy under accepted New York law is a separate crime, apart from any substantive acts which may constitute another crime and that the conspiracy does not merge with the completed crime. (*People* v. *Tavormina*, 257 N. Y. 84).

In *People ex rel. Hart* v. *Truesdell*, 260 N. Y. App. Div. 884, 22 N. Y. S. 2d 825, the defendant had been tried and acquitted of a conspiracy to violate the gambling laws. He was thereafter charged with the substantive violation of the gambling laws themselves, the same transaction being involved. The Appellate Division, in a memorandum opinion, held that the constitutional prohibition against double jeopardy was not violated, saying:

> "the crime of Conspiracy to operate a policy game is a separate and distinct crime from the crime of policy playing (*People* v. *Tavormina*, 257 N. Y. 84). The former is not a part of the latter and an acquittal of the former charge is not a bar to the prosecution of the latter."

See, also, *People* v. *Taft*, 174 N. Y. Misc. 1033, 22 N. Y. S. 2d 484.

POINT III

The refusal of the New York Courts to accept petitioner's claim of double jeopardy did not deprive him of due process under the Fourteenth Amendment of the Constitution of the United States.

It appears to be conceded that the double jeopardy provision of the Fifth Amendment to the United States Constitution is not applicable to the proceedings at bar (Petition, page 11a).

On this record we urge that the rejection of the plea of *autrefois acquit* did not deprive him of the Federally guaranteed due process. We are mindful of the Federal strictures against state procedures which involve "cruelty of harassment by multiple prosecution" (*Bartkus* v. *Illinois*, 359 U. S. 121, at 127) or which "callously subjects an individual to successive retrials on a charge on which he has been acquitted" (*Brock* v. *North Carolina*, 344 U. S. 424, at 429). But the fact pattern at bar falls far short of these admonitions. This record does not paint a picture of a vengeful, relentless state pursuing a defendant through successive trials and repeated acquittals until a conviction is ultimately obtained, nor, as we have observed in Point II, *Supra*, has petitioner ever been acquitted of the charge of which he now stands convicted, Coercion.

We urge that the problem of double jeopardy, as presented by this record, is essentially one of local or general law, to be similarly resolved through local judicial process, and does not present a substantial question of a Federal nature (*Shoener* v. *Pennsylvania*, 28 S. Ct. 110, 207 U. S. 188, 52 L. Ed. 163).

Even were we to assume that the Courts below were in legal error in rejecting petitioner's claim of double jeopardy, no Federal question, we believe, on the facts here presented, would thereby be suggested.

See

Gibson v. *Mississippi*, 162 U. S. 565, 591; 16 S. Ct. 904, 40 L. Ed. 107;

Barrington v. *Missouri*, 27 S. Ct. 582; 205 U. S. 483, 51 L. Ed. 890.

At all events, the practices revealed in the record at bar cannot reasonably and fairly be said to be "repugnant to the conscience of mankind" (*Palko* v. *Connecticut*, 302 U. S. 319, at 323), such as would invite scrutiny by this Court under the Fourteenth Amendment.

CONCLUSION

The petition should be denied.

Dated: Brooklyn, New York
October, 1962.

Respectfully submitted,

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